Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

No. 94-1838

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OXY USA INC.,

Petitioner,

v.

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OXY USA INC.'S RESPONSE TO CONTINENTAL TREND RESOURCES, INC.'S SECOND SUPPLEMENTAL BRIEF

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OXY USA INC.'S RESPONSE TO CONTINENTAL TREND RESOURCES, INC.'S SECOND SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner OXY USA Inc.[1] ("OXY") respectfully submits its Response to the Second Supplemental Brief of Respondents Continental Trend Resources, Inc., *et al.* (collectively "CTR"), filed May 22, 1996. OXY's petition for certiorari presented a question virtually identical to that presented in *BMW of N. Am., Inc. v. Gore*, ___U.S. ___, No. 94-896 (U.S. May 20, 1996), which the Court decided on May 20. There is no question that the standards enunciated by this Court in *BMW* must be applied in this case as well. In its petition for certiorari, OXY urged this Court either to grant its petition or, in the alternative, to retain the case on its docket and dispose of the matter appropriately in light of the decision in *BMW*. Pet. at 30.

CTR's current brief is an argument on the merits concerning the application of the *BMW* decision to the facts of this case.[2] Such an argument is, of course, wholly inappropriate in the context of a petition for certiorari. OXY's petition pre-

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[1] The parent companies of OXY USA Inc. are Occidental Oil and Gas Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. OXY USA Inc. owns minority interests in Canadian Occidental Petroleum, Ltd., Industrias OXY, S.A. de C.V., and East Texas Salt Water Disposal Company. All other companies in which OXY USA Inc. owns an interest are wholly-owned subsidiaries.

[2] Respondents also repeat their erroneous argument that OXY has waived certain of its questions presented. Second Supp. Br. at 1-2. That argument has nothing to do with the decision in *BMW* and is beyond the scope of a proper supplemental brief. *See* Rule 15.8 In any event, OXY has already responded to this argument in its Reply Memorandum. *See* Reply at 8-9.

sented the question whether the Tenth Circuit applied the proper constitutional standard in reviewing a punitive damages award for excessiveness. Pet. at i. The *BMW* decision demonstrates that the Tenth Circuit did not. Unless this Court grants certiorari for plenary review of this case, it should follow its traditional practice of granting the petition, vacating the judgment, and remanding to the Tenth Circuit for application of the proper analysis under *BMW*.

1. Contrary to CTR's argument, the Tenth Circuit most certainly did not apply the constitutional analysis articulated in *BMW*. The Tenth Circuit applied "shocks the conscience" review to test the constitutionality of the $30,000,000 award. Pet. 18a. By contrast, this Court explained in *BMW* that proper constitutional review of punitive damages awards should focus on three factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive award to compensatory damages; and (3) a comparison to civil and criminal penalties that might be imposed for comparable misconduct. In addition, a reviewing court must consider "whether less drastic remedies could be expected to achieve th[e] goal" of deterrence of future misconduct. *BMW*, slip op. at 25. The Tenth Circuit did not apply these factors.

With respect to the first guidepost — the degree of reprehensibility — this Court held in *BMW* that there is a distinction between acts that cause harm that is "purely economic in nature" and acts that evince "indifference to or reckless disregard for the health and safety of others." *Id.* at 16. The damage in this case is solely economic. In contrast to this Court's analysis in *BMW*, the Tenth Circuit expressly rejected the argument that it should consider OXY's conduct less culpable because it caused only economic harm rather than harm to health or safety. Pet. 19a.

In *BMW* this Court identified the ratio between punitive and compensatory damages as the second guidepost in judg-

ing the excessiveness of punitive damages. In doing so, it held that punitive damages "must bear a 'reasonable relationship' to compensatory damages . . . ." *BMW*, slip op. at 20. In this case the ratio between the punitive award and compensatory damages was 111:1. Far from considering this ratio as a relevant factor, the Tenth Circuit apparently believed that the plurality opinion in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), had rendered such high ratios irrelevant, and the court of appeals dismissed the huge disparity in this case as a factor. Pet. 19a-20a.

The Tenth Circuit's opinion below failed altogether to address this Court's third guidepost requiring that the punitive award be compared to analogous civil and criminal fines.

In addition, the court of appeals concluded that $30,000,000 is "not necessarily a shocking figure" in relation to what is necessary to punish a wealthy corporation. Pet. 21a. However, it failed to consider whether a less drastic remedy could be expected to achieve the same goal, as is required by *BMW*. *See BMW*, slip op. at 25.

Nor did the Tenth Circuit address another central question under *BMW*: whether OXY was being punished in part for conduct aimed at consumers outside the State of Oklahoma. The trial court justified the award on the ground that "OXY's conduct incrementally damages the United States in its present struggle to remain a global economic power," and the Tenth Circuit cited this statement with approval in upholding the award. Pet. 15a. Moreover, it justified the award based on the alleged effect of OXY's actions on 6,000 gas producers connected to OXY's multi-state operations. *Id.*

In short, it is quite clear that the Tenth Circuit did not consider this case under the standards established by *BMW*.

2. CTR argues at considerable length that this Court should take upon itself the task of applying the principles of

BMW to the record in this case. Such an action would be appropriate, however, only after the parties have briefed and argued the merits on plenary consideration. The appropriate procedure, in the event this Court does not grant certiorari for plenary consideration, is to grant certiorari, vacate and remand to the Tenth Circuit.[3]

The action urged by CTR would deprive OXY of review under the constitutionally-based standards enunciated by this Court in *BMW*. Such a decision should not be made on the basis of the abbreviated record presented in a petition for certiorari or, even less, on the basis of gross misrepresentations about the record made in an eleventh-hour supplemental brief. Such issues are worthy of plenary consideration under the principles enunciated in *BMW* — if not by this Court, then by the Tenth Circuit.

3. OXY's petition also presents at least one additional question separate from the *BMW* decision: whether a $30,000,000 punitive damages award predicated primarily on the wealth of the defendant is constitutionally excessive. *See* Pet. at i, 19-30. The *BMW* decision did not address the relevance of the defendant's financial condition in constitutional

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[3] As the Court has recently noted:

> [A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary jurisdiction, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Lawrence ex rel. Lawrence v. Chater, 116 S. Ct. 604, 606-07 (1996) (alterations and internal quotation marks omitted).

review. This case presents an ideal vehicle for such further clarification following *BMW*.

In conclusion, this Court should either grant the petition and set this case for plenary review or remand the case to the Tenth Circuit for reconsideration under the principles of *BMW*.

Respectfully submitted,

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Dated: May 23, 1996